

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RAYMOND MASCARENAS,

Case No. 3:14-cv-00054-MMD-VPC

Petitioner,

ORDER

v.

GREG SMITH, *et al.*,

Respondents.

I. INTRODUCTION

This action is a petition for writ of habeas corpus by Raymond Mascarenas, a Nevada prisoner. The action is before the Court with respect to the merits of the claims remaining in Mascarenas' petition. The Court will deny Mascarenas' petition.

II. BACKGROUND

On August 31, 2009, Mascarenas was convicted, pursuant to a jury verdict, in Nevada's Second Judicial District Court, of sexual assault, and he was sentenced to life in prison with the possibility of parole after ten years. See Judgment, Exh. 20 (ECF No. 22-6). (The exhibits referred to in this order were filed by the respondents and are found in the record at ECF Nos. 20-22, 27 and 36.)

Mascarenas appealed, and the Nevada Supreme Court affirmed on September 29, 2010. See Order of Affirmance, Exh. 23 (ECF No. 22-9).

On October 6, 2011, Mascarenas filed a petition for writ of habeas corpus in the state district court. See Petition for Writ of Habeas Corpus, Exh. 25 (ECF No. 22-11).

1 Counsel was appointed for Mascarenas, and, with counsel, Mascarenas filed a
2 supplemental habeas petition on May 30, 2012. See Supplemental Petition for Writ of
3 Habeas Corpus, Exh. 27 (ECF No. 22-13). The state district court held an evidentiary
4 hearing on March 28, 2013. See Transcript of Evidentiary Hearing, Exh. 34 (ECF No.
5 22-20). On March 29, 2013, the state district court entered an order denying
6 Mascarenas' petition. See Order entered March 29, 2016, Exh. 35 (ECF No. 22-21).
7 Mascarenas appealed, and the Nevada Supreme Court affirmed on January 24, 2014.
8 See Order of Affirmance, Exh. 38 (ECF No. 22-24).

9 Mascarenas initiated this federal habeas corpus action on January 27, 2014, by
10 filing a *pro se* habeas corpus petition (ECF No. 8).

11 Respondents filed a motion to dismiss (ECF No. 19), asserting that two claims in
12 Mascarenas' habeas petition were not exhausted in state court, and not cognizable in
13 this federal habeas action. After ordering the respondents to expand the record to
14 include certain briefing of the parties before the Nevada Supreme Court (ECF No. 26),
15 and after respondents expanded the record as ordered (ECF No. 27), on June 15, 2015,
16 the Court granted the motion to dismiss in part and denied it in part; the Court ruled that
17 Ground 3 of Mascarenas' petition was unexhausted, and required Mascarenas to either
18 abandon that claim or move for a stay so that he could exhaust it in state court. See
19 Order entered June 15, 2015 (ECF No. 28). Mascarenas abandoned the unexhausted
20 claim. See Petitioner's Declaration, filed June 29, 2015 (ECF No. 29).

21 On October 22, 2015, respondents filed an answer (ECF No. 35), responding to
22 Mascarenas' remaining claims. Mascarenas filed a reply on December 16, 2015 (ECF
23 No. 37).

24 On June 22, 2016, the Court entered an order (ECF No. 38) directing
25 respondents to further supplement the record, by filing, as exhibits, the video and
26 transcript of Mascarenas' statement to the police. Respondents complied with that
27 order, by filing those exhibits, on August 4, 2016 (ECF No. 42).

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1 The remaining claims in Mascarenas' habeas petition are now before the Court
2 with respect to their merits.

3 **III. DISCUSSION**

4 **A. Standard of Review**

5 28 U.S.C. § 2254(d) sets forth the primary standard of review applicable in this
6 case under the Antiterrorism and Effective Death Penalty Act (AEDPA):

7 An application for a writ of habeas corpus on behalf of a person in
8 custody pursuant to the judgment of a State court shall not be granted with
9 respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim —

10 (1) resulted in a decision that was contrary to, or involved an
unreasonable application of, clearly established Federal law, as
11 determined by the Supreme Court of the United States; or

12 (2) resulted in a decision that was based on an unreasonable
determination of the facts in light of the evidence presented in the State
13 court proceeding.

14 28 U.S.C. § 2254(d).

15 A state court decision is contrary to clearly established Supreme Court
16 precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that
17 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state
18 court confronts a set of facts that are materially indistinguishable from a decision of [the
19 Supreme Court] and nevertheless arrives at a result different from [the Supreme
20 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v.*
21 *Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

22 A state court decision is an unreasonable application of clearly established
23 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court
24 identifies the correct governing legal principle from [the Supreme Court’s] decisions but
25 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538
26 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause
27 requires the state court decision to be more than incorrect or erroneous; the state

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1 court's application of clearly established law must be objectively unreasonable. *Id.*
 2 (quoting *Williams*, 529 U.S. at 409).

3 The Supreme Court has instructed that "[a] state court's determination that a
 4 claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could
 5 disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562
 6 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The
 7 Supreme Court has stated "that even a strong case for relief does not mean the state
 8 court's contrary conclusion was unreasonable." *Id.* at 102 (citing *Lockyer*, 538 U.S. at
 9 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing standard as "a
 10 difficult to meet" and "highly deferential standard for evaluating state-court rulings, which
 11 demands that state-court decisions be given the benefit of the doubt" (internal quotation
 12 marks and citations omitted)).

13 **B. Ground 1**

14 In Ground 1 of his habeas petition, Mascarenas claims that his federal
 15 constitutional rights were violated because the jury instructions "failed to indicate that a
 16 reasonable doubt as to whether he acted under a reasonable but mistaken belief of
 17 consent . . . gave rise to a duty to acquit." Petition for Writ of Habeas Corpus (ECF No.
 18 8) at 3-3a.

19 Mascarenas asserted this claim on his direct appeal. See Appellant's Opening
 20 Brief, Exh. 40 at 8-10 (ECF No. 27-1 at 16-18). The Nevada Supreme Court ruled as
 21 follows:

22 . . . Mascarenas claims that the jury instruction on mistaken belief
 23 of consent was inadequate, as it did not properly convey the defense
 24 theory of consent and did not restate the burden of proof. The instruction
 25 given on this issue was the instruction Mascarenas submitted and he
 26 therefore cannot now complain that the district court erred in accepting it.
 Additionally, the jury was instructed that the State had the burden to prove
 every element of the crime beyond a reasonable doubt, and we presume it
 followed that instruction. *Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246,
 1250 (2004).

27 Order of Affirmance, Exh. 23 at 1-2 (ECF No. 22-9 at 3-4).

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1 The jury was instructed regarding the elements of the crime of sexual assault, as
2 follows:

3 In order to prove the crime of sexual assault each of the following
4 elements must be proved:

5 (1) A person willfully and unlawfully subjects another person to
sexual penetration; and

6 (2) The act of penetration is against the will of the victim; or . . .
7 [t]he act of penetration is under conditions in which the perpetrator knows
8 or should know that the victim is mentally or physically incapable of
resisting or understanding the nature of the perpetrator's conduct.

9 "Against the will" means without the consent of the victim.

10 "Victim" means a person who is subjected to a sexual assault.

11 Jury Instructions, Exh. 15, Instruction No. 23 (ECF No. 22-1, p. 24). The jury was
12 instructed, as follows, regarding the issue of consent:

13 To find the Defendant guilty of sexual assault, you must find that
14 he had sexual intercourse with the prosecuting witness without her
consent.

15 Consent may be explicit, or consent may be implied from a
16 consideration of the totality of the circumstances.

17 In determining whether or not the Defendant believed that he
18 had the consent of the prosecuting witness, you are to determine if,
under the totality of the circumstances, a reasonable person would
believe that the prosecuting witness consented.

19 *Id.*, Instruction No. 29 (ECF No. 22-1, p. 30); *see also id.*, Instruction Nos. 26, 27, 30
20 (ECF No. 22-1, pp. 27, 28, 31). And, the jury was instructed as follows, regarding the
21 State's burden of proving every element of the crime beyond a reasonable doubt.

22 Every person charged with the commission of a crime shall be
23 presumed innocent unless the contrary is proven by competent
24 evidence. The burden rests upon the prosecution to establish every
element of the crime with which the defendant is charged beyond a
reasonable doubt.

25 Jury Instructions, Exh. 15, Instruction No. 18 (ECF No. 22-1 at 19).

26 The state supreme court reasonably ruled that these instructions adequately
27 informed the jury of the burden of the prosecution to prove beyond a reasonable doubt

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1 every element of the crime, including the lack-of-consent element. Mascarenas points to
2 no Supreme Court precedent — and this Court knows of none — requiring more.

3 The state courts' denial of relief on this claim was not contrary to, or an
4 unreasonable application of, clearly established federal law, as determined by the
5 Supreme Court, and was not based on an unreasonable determination of the facts in
6 light of the evidence presented. This Court will deny relief with respect to Ground 1.

7 **C. Ground 2**

8 In Ground 2, Mascarenas claims that his federal constitutional rights were
9 violated by the introduction into evidence of a statement that he gave to the police,
10 because the statement was not voluntarily given. See Petition for Writ of Habeas
11 Corpus at 5-5b.

12 Mascarenas did not object to the introduction of his statement into evidence. See
13 Appellant's Reply Brief, Exh. 42 at 3 (ECF No. 27-3 at 8) ("Mr. Mascarenas did not raise
14 the question of his statement to the police in a pre-trial motion."). And, in closing
15 argument before the jury, Mascarenas conceded that his statement was "probably not"
16 involuntary. See Defense Closing Argument, Trial Transcript, July 9, 2009, Exh. 14 at
17 294 (ECF No. 21-4 at 57). It appears that, at trial, Mascarenas did not seriously
18 challenge the voluntariness of his statement because, for the most part, Mascarenas did
19 not incriminate himself in his statement, especially with regard to the important issue of
20 consent; rather, the defense affirmatively used Mascarenas' statement as a means of
21 putting his version of the events before the jury, without him having to testify. See *id.* at
22 289 (ECF No. 21-4 at 52) ("[W]e're left in this case to decide the truth of this accusation,
23 this most serious accusation on the basis of her testimony versus the statement of
24 Raymond Mascarenas."); *id.* at 291 (ECF No. 21-4 at 54 ("Raymond didn't testify in this
25 case and you can't hold it against him. But you heard his story anyway. It came in
26 through his interview. He told you what he saw and what he heard."); *id.* at 293 (ECF
27 No. 21-4 at 56 ("So you see it's a credibility contest between what [the victim] said and
28 what you heard from Raymond Mascarenas.")).

1 Despite his embrace of his statement to the police at trial, Mascarenas claimed
2 on his direct appeal, without any factual development of the claim, that his statement
3 was involuntary. See Appellant's Opening Brief, Exh. 40 at 10-16 (ECF No. 27-1 at 18-
4 24). The Nevada Supreme Court ruled on that claim as follows:

5 . . . Mascarenas argues that his confession was involuntary and its
6 admission was plain error. Mascarenas was dropped off by a family
7 member for an interview with a detective at a Social Services building,
8 where he admitted to sexual contact with the victim. Mascarenas was
9 seventeen at the time of the two-hour interview and was told that his
10 parents could be present and that he could leave at any time. The
11 interview was conversational and Mascarenas left freely at its conclusion.
12 Mascarenas asserts that his age and the detective's suggestion that he
could "smooth things over" for Mascarenas rendered the interview
coercive. In the totality of the circumstances reflected in the record, we
cannot agree that his will was overborne, see *Passama v. State*, 103 Nev.
212, 214, 735 P.2d 321, 323 (1987), and conclude that none of his
substantial rights were affected, see *Kaczmarek v. State*, 120 Nev. 314,
328, 91 P.3d 16, 26 (2004).

13 Order of Affirmance, Exh. 23 at 2 (ECF No. 22-9 at 4).

14 In his subsequent state habeas action, Mascarenas did not raise the claim that
15 his statement to the police was involuntary.

16 "Involuntary or coerced confessions are inadmissible at trial, *Lego v. Twomey*,
17 404 U.S. 477, 478, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), because their admission is a
18 violation of a defendant's right to due process under the Fourteenth Amendment,
19 *Jackson v. Denno*, 378 U.S. 368, 385-86, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)." *Brown*
20 *v. Horell*, 644 F.3d 969, 979 (9th Cir. 2011). An inculpatory statement is voluntary, and
21 admissible as evidence, if it is the product of a rational intellect and a free will.
22 *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). Coercive police activity is a
23 "necessary predicate" to finding a confession involuntary within the meaning of the Due
24 Process Clause. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Ortiz v. Uribe*, 671
25 F.3d 863, 869 (9th Cir. 2011). The test is whether, considering the totality of the
26 circumstances, "the government obtained the statement by physical or psychological
27 coercion or by improper inducement so that the suspect's will was overborne." *Haynes*
28 *v. Washington*, 373 U.S. 503, 513-14 (1963); *United States v. Tingle*, 658 F.2d 1332,

1 1335 (9th Cir. 1981); see also *Dickerson v. United States*, 530 U.S. 428, 434 (2000).
2 The totality of the circumstances includes “both the characteristics of the accused and
3 the details of the interrogation.” *Dickerson*, 530 U.S. at 434; *United States v. Kelley*, 953
4 F.2d 562, 564 (9th Cir. 1992). The Supreme Court has emphasized that confessions of
5 juveniles warrant special caution. See *Doody v. Ryan*, 649 F.3d 986, 1008 (9th Cir.
6 2011) (en banc) (quoting *In re Gault*, 387 U.S. 1, 45 (1967)).

7 As a result of Mascarenas' failure to object to the admission of his statement at
8 trial — and in fact his reliance on his statement in his defense at trial — along with his
9 challenge of the voluntariness of the statement on direct appeal but not in his state
10 habeas action, Mascarenas failed to develop the facts regarding this claim in state
11 court. The Court's habeas review, under 28 U.S.C. § 2254(d), is limited to the record
12 that was before the state supreme court on the direct appeal. See *Cullen v. Pinholster*,
13 563 U.S. 170, 181 (2011) (federal court review under section 2254(d) “limited to the
14 record that was before the state court that adjudicated the claim on the merits”).

15 Despite Mascarenas' failure to fully develop the facts, there is significant support
16 in the record for the Nevada Supreme Court's conclusion that the statement was
17 voluntary. Mascarenas was not under arrest when he gave his statement to the police;
18 in fact, Mascarenas contacted the police officer by telephone, and, during that
19 telephone call, they arranged to meet. See Testimony of Eric Stroshine, Trial Transcript,
20 July 8, 2009, Exh. 12B at 217-18 (ECF No. 21-2 at 36-37). When they spoke on the
21 telephone, the police officer suggested that Mascarenas should bring his parents with
22 him to the interview. See *id.* at 218 (ECF No. 21-2, p. 37) (“I told him that being as he
23 was a juvenile, that it would be nice to talk to his parents, let them know what’s going on
24 and if they would like to come down, they could come down and we can all talk.”).
25 Mascarenas subsequently went into the police station of his own free will, without his
26 parents, and, at the beginning of the interview, the police officer told him that he could
27 leave at any time. See *id.* at 217-19 (ECF No. 21-2 at 36-38); Transcript of Interview,
28 Exh. 54 at 2, lines 19-21 (filed under seal). There was no indication during the interview

1 that Mascarenas was of low intelligence or mentally impaired; Mascarenas appeared to
2 understand the officer's questions, he responded without any hesitancy, and his
3 responses were lucid. See Transcript of Interview, Exh. 54 (filed under seal). The
4 interview was not unusually long, and Mascarenas did not express any desire to
5 discontinue the interview. See *id.* When the interview concluded, Mascarenas left the
6 police station.

7 The Court recognizes that the interviewing officer made statements to
8 Mascarenas that may be construed as deceptive and coercive, in that they might have
9 suggested that the officer had more evidence incriminating Mascarenas than he actually
10 had. See, e.g., Transcript of Interview, Exh. 54 at 12, lines 17-22 ("Listen, here's the
11 thing. I — I know a lot more than you think I do, OK? And what I usually try and do,
12 right, is . . . is like I tell you at the beginning. Be honest with me, don't jerk me around
13 because I can smooth things over but when people lie to me that's when I think
14 everything's a lie. Then once I think that then it goes downhill real quick, OK? Because
15 then what I'll do is I just won't talk to anyone anymore and I'll just start throwing
16 handcuffs on people. . . . And you don't want that. And I don't want to do that. Believe
17 me, I don't get any enjoyment out of any of it, OK? But, I know a lot more than you think
18 I do. . . . OK? I've been doing this job a long time and I've been around the block a few
19 times . . . I've been in your shoes a few times. So I'm not dumb, OK? I know what you're
20 thinking and I know how shit works. OK? So, who . . . who was there that night, bud?");
21 *id.* at 16, line 15 (" . . . [K]eep in mind, I know things."); *id.* at 37, lines 6-7 ("She took a
22 pretty thorough exam and um, that tells me, everything that happened that night.").
23 However, both the Supreme Court and the Ninth Circuit Court of Appeals have held that
24 such deception is generally within the range of permissible interrogation tactics, and,
25 while relevant to the question of the voluntariness of a confession, do not necessarily
26 render the confession involuntary. See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969)
27 (holding that a police officer's lie to defendant about his cousin confessing to the
28 commission of a murder was "insufficient in [the Supreme Court's] view to make [an]

1 otherwise voluntary confession inadmissible”); *United States v. Crawford*, 372 F.3d
2 1048, 1061 (9th Cir. 2004) (instructing that trickery and deceit do not necessarily render
3 a confession involuntary); *United States v. Orso*, 266 F.3d 1030, 1039 (9th Cir.) (en
4 banc), cert. denied, 537 U.S. 828 (2001), overruled on other grounds by *Missouri v.*
5 *Seibert*, 542 U.S. 600 (2004) (holding that an officer’s misrepresentation regarding
6 certain evidence existed did not constitute coercive conduct rendering the defendant’s
7 confession involuntary). Here, it is not clear whether, or to what extent, the interviewing
8 officer misrepresented the evidence he had against Mascarenas, and, regardless, in
9 this Court’s view, this aspect of the officer’s tactics did not render the statement
10 involuntary.

11 The Court also recognizes that the interviewing police officer made comments
12 that could be construed as misleading Mascarenas to believe that if he answered the
13 officer’s questions he would not face charges, or would otherwise receive lenient
14 treatment. See, e.g., Transcript of Interview, Exh. 54 at 5, lines 10-11 (“So as long as
15 you’re honest with me, hopefully we can smooth all this out.”); *id.* at 5, lines 25-26
16 (“Seriously, because this can be fixed, or, it can’t be.”); *id.* at 12, lines 19-20 (“Be honest
17 with me, don’t jerk me around because I can smooth things over. . . .”); see also *id.* at
18 33, lines 4-6 (“Because what’s going to have to happen is I’m going to have to start
19 issuing warrants and shit like that, and I don’t want to do that. But I will.”). The Ninth
20 Circuit Court of Appeals has explained that such statements by an interviewing officer
21 can be coercive, especially where the suspect is intellectually impaired. See *United*
22 *States v. Preston*, 751 F.3d 1008, 1026-27 (9th Cir. 2014) (en banc). Mascarenas was
23 seventeen years old when he was interviewed, and, while there is no evidence that he
24 was of especially low intelligence or intellectually impaired, he had only an eighth grade
25 education. See Transcript of Post Conviction Evidentiary Hearing, Exh. 34 at 32, 35, 44-
26 45, 51 (ECF No. 22-20 at 34, 37, 46-47, 53). Under these circumstances — especially
27 in light of Mascarenas’ age and limited education — this Court has some concern that
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1 these coercive statements by the police officer may have tended to overbear
2 Mascarenas' will.

3 However, at the same time, the Court is mindful that the Nevada Supreme Court
4 ruled on this issue, and found Mascarenas' statement to be voluntary, and that,
5 therefore, this Court is to apply the very deferential standard mandated by 28 U.S.C. §
6 2254(d). The issue boils down to the formulation announced in the Supreme Court's
7 *Harrington* decision: whether "'fairminded jurists could disagree' on the correctness of
8 the state court's decision." *Harrington*, 562 U.S. at 101. Taking into account the
9 circumstances surrounding Mascarenas' statement, as disclosed in the record before
10 the Nevada Supreme Court, this Court certainly cannot say that the ruling of the Nevada
11 Supreme Court was so unreasonable as to be beyond debate by fairminded jurists.

12 Giving the state court's ruling the deference required under section 2254(d), this
13 Court denies relief with respect to Ground 2.

14 **D. Ground 4**

15 In Ground 4, Mascarenas claims that his federal constitutional rights were
16 violated as a result of the victim's unsolicited statement during her testimony that she
17 was a virgin. See Petition for Writ of Habeas Corpus at 8a-8b.

18 Mascarenas asserted this claim on his direct appeal. See Appellant's Opening
19 Brief, Exh. 40 at 24-28 (ECF No. 27-1 at 32-36). The Nevada Supreme Court ruled as
20 follows:

21 . . . Mascarenas argues that the victim's spontaneous statement
22 during her trial testimony that she was a virgin before the assault deprived
23 him of a fair trial. We disagree. Recognizing that the statement was
24 unsolicited, Mascarenas declined to ask for a hearing to present evidence
25 that the victim was not a virgin and instead suggested that the district
26 court specifically instruct the jury to disregard the comment. The court
27 gave that instruction and we conclude that it was adequate to cure any
28 resulting prejudice.

Order of Affirmance, Exh. 23 at 3 (ECF No. 22-9 at 5).

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1 The testimony of the victim that is the subject of this claim was as follows:

2 Q. Did you think anything about your conduct that night told
3 Raymond Mascarenas that you wanted to engage in sexual intercourse?

4 A. I didn't want to do anything. He did it. I was a virgin before all
5 of this.

6 Trial Transcript, July 7, 2009, Exh. 10B at 80 (ECF No. 20-11 at 25). Defense counsel
7 objected, and the trial court initially overruled the objection. *Id.* The trial court
8 subsequently heard from counsel regarding the matter, outside the presence of the jury.
9 *Id.* at 107-11 (ECF No. 20-11 at 52-56); Trial Transcript, July 8, 2009, Exh. 12A at 116-
10 20 (ECF No. 21-1 at 5-9). Upon the request of the defense, the trial court then reversed
11 its ruling, and instructed the jury to disregard the victim's statement that she was a
12 virgin. See Trial Transcript, July 8, 2009, Exh. 12A at 117-20 (ECF No. 21-1 at 6-9).
13 When the jury was next brought in the courtroom, the trial court instructed the jury as
14 follows:

15 Ladies and gentlemen, from time to time questions come up about
16 court procedures and I thought I'd take this opportunity to talk to you a little
17 bit about that. Often times, sometimes during trial, you'll hear attorneys
18 stand up and object to a question or an answer. It's the attorneys'
19 obligation to object to evidence they don't feel is proper and it's my
20 obligation as a judge to rule on that objection. You're not to hold it against
21 the lawyer or their client if they object. It's their obligation, their job.

22 For example, yesterday the witness testified that she was a virgin.
23 There was an objection to that. I overruled the objection yesterday, but
24 after reflection last night, I realized that I was in error. And so I'm going to
25 sustain the objection here, which means you're not to consider it.

26 Also, you'll hear motions to strike, which means to take that
27 evidence off the record. That motion, particularly with respect to that
28 statement, is granted, which means you're not to consider it in your
deliberations, it's irrelevant and it has nothing to do with the issues at
stake here in this case.

So, once again, don't hold it against the attorneys. It's my obligation
to make these rulings and it's your obligation to follow the rulings of the
Court. You're not to consider that statement in any deliberations that will
occur in this case.

26 Trial Transcript, July 8, 2009, Exh. 12A at 121-22 (ECF No. 21-1 at 10-12).

27 State-court evidence rulings are not subject to federal habeas review unless a
28 specific constitutional guarantee is violated or the error is of such magnitude that the

1 result is a denial of the fundamentally fair trial guaranteed by the due process clause of
 2 the federal constitution. See *Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999);
 3 *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986). The
 4 due process inquiry is whether the admission of the evidence was arbitrary or so
 5 prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d
 6 1355, 1357 (9th Cir. 1995); *Colley*, 784 F.2d at 990. A habeas petitioner “bears a heavy
 7 burden in showing a due process violation based on an evidentiary decision.” *Boyde v.*
 8 *Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005).

9 Here, the unsolicited statement of the victim that she was a virgin was not so
 10 prejudicial that it rendered Mascarenas’ trial fundamentally unfair. As requested by the
 11 defense, the trial court instructed the jury to disregard the statement, curing any unfair
 12 prejudice to Mascarenas. See *Greer v. Miller*, 483 U.S. 756, 766 n. 8 (1987) (the Court
 13 “normally presume[s] that a jury will follow an instruction to disregard inadmissible
 14 evidence inadvertently presented to it”).

15 The state supreme court's ruling on this claim was not contrary to, or an
 16 unreasonable application of, clearly established federal law, as determined by the
 17 Supreme Court, and was not based on an unreasonable determination of the facts in
 18 light of the evidence presented. The Court will deny relief with respect to Ground 4.

19 **E. Ground 5**

20 In Ground 5, Mascarenas claims that his federal constitutional rights were
 21 violated because the evidence at trial was insufficient to convict him of sexual assault.
 22 See Petition for Writ of Habeas Corpus at 8c-8d.

23 Mascarenas asserted this claim on his direct appeal. See Appellant's Opening
 24 Brief, Exh. 40 at 28-29 (ECF No. 27-1 at 36-37). The Nevada Supreme Court ruled as
 25 follows:

26 . . . Mascarenas claims that insufficient evidence supports his
 27 conviction. The victim testified that Mascarenas anally penetrated her
 28 while she attempted to resist, and this testimony alone is sufficient to
 uphold the conviction. *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408,
 414 (2007). Nonetheless, significant corroborating evidence supports the

1 conviction, including a nurse who testified that the victim's injuries were
2 most likely the result of nonconsensual sex. We thus conclude that a
3 rational juror could have found each element of sexual assault beyond a
reasonable doubt. See *Origel-Candido v. State*, 114 Nev. 378, 381, 956
P.2d 1378, 1380 (1998); NRS 200.366.

4 Order of Affirmance, Exh. 23 at 1 (ECF No. 22-9 at 3).

5 As a matter of federal constitutional law, "the Due Process Clause protects the
6 accused against conviction except upon proof beyond a reasonable doubt of every fact
7 necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S.
8 358, 364 (1970). When reviewing a sufficiency of the evidence claim, a federal habeas
9 court must determine whether, viewing the evidence and the inferences to be drawn
10 from it in the light most favorable to the prosecution, any rational trier of fact could find
11 the essential elements of the crime beyond a reasonable doubt. See *Jackson v.*
12 *Virginia*, 443 U.S. 307, 319 (1979). A federal habeas court "faced with a record of
13 historical facts that supports conflicting inferences must presume — even if it does not
14 affirmatively appear in the record — that the trier of fact resolved any such conflicts in
15 favor of the prosecution, and must defer to that resolution." *Id.* at 326.

16 Furthermore, beyond the deference that the federal habeas court must afford the
17 trier of fact, the federal habeas court must "apply the standards of [*Jackson*] with an
18 additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005).
19 Applying the AEDPA standard, the federal habeas court must ask "whether the decision
20 of the [state appellate court] reflected an 'unreasonable application' of *Jackson* and
21 *Winship* to the facts of this case." *Id.* at 1275 & n.13.

22 This Court agrees with the ruling of the Nevada Supreme Court on this claim.
23 The victim's testimony was sufficient, by itself, to support Mascarenas' conviction (see
24 Trial Transcript, July 7, 2009, Exhibits 10A and 10B at 12-80 (ECF No. 20-10 at 14 -
25 ECF No. 20-11 at 25); moreover, her testimony was corroborated in many respects by
26 other evidence, notably the evidence that seminal fluid was found on the victim's body
27 (see Trial Transcript, July 8, 2009, Exh. 12A at 151-57 (ECF No. 21-1 at 40-46)), and
28 the evidence regarding the injuries suffered by the victim (see *id.* at 175-82 (ECF No.

1 21-1 at 64-71)), and Exh. 12B at 183-93 (ECF No. 21-2 at 2-12)). Mascarenas asserts
2 that there was insufficient evidence that the victim did not consent; however, this Court
3 finds that there was ample evidence at trial showing that the victim did not consent, and
4 that her lack of consent was plain: the victim testified that she was intoxicated to the
5 point where she did not have control over her body (see Trial Transcript, July 7, 2009,
6 Exh. 10A at 35, 37, 40-42 (ECF No. 20-10 at 37, 39, 42-44)); the victim testified that she
7 screamed when Mascarenas anally penetrated her (see *id.* at 38-40 (ECF No. 20-10 at
8 40-42)); the victim testified that she tried to move away when Mascarenas anally
9 penetrated her (see *id.* at 38-39 (ECF No. 20-10 at 40-41)); the victim testified that she
10 resisted by turning her body, trying to move away, kicking, shoving, and trying to keep
11 her legs closed (see *id.* at 57-58 (ECF No. 20-10 at 59-60)); the victim testified that
12 Mascarenas and the others physically held her down while Mascarenas had sex with
13 her (see *id.* at 39, 57-58 (ECF No. 20-10 at 41, 59-60)); the victim testified that, in the
14 bathroom, after throwing up, she was wobbly and could not control herself, and
15 Mascarenas held her head up by her hair with two hands, and put his penis in her
16 mouth (see *id.* at 41-42 (ECF No. 20-10 at 43-44)); the victim testified that, before
17 Mascarenas left, he told her not to say anything or they would kill her (see *id.* at 50
18 (ECF No. 20-10 at 52)); the detective who investigated the case testified that records
19 regarding the victim's mobile telephone showed that her frequent texting ceased from
20 about 3:17 a.m. to about 5:37 a.m., the time period during which the sexual assault
21 likely occurred (see Trial Transcript, July 8, 2009, Exh. 12B at 229-31 (ECF No. 21-2 at
22 48-50)).

23 The state courts' ruling that there was sufficient evidence to support Mascarenas'
24 conviction was not contrary to, or an unreasonable application of, clearly established
25 federal law, as determined by the Supreme Court, and was not based on an
26 unreasonable determination of the facts in light of the evidence presented. The Court
27 will deny relief with respect to Ground 5.

28 ///

1 Amendment has been met. Even if he had communicated with Petitioner's
2 parents or done more to take into account Petitioner's age, education,
3 experience, and maturity, the advice would not, and should not have
changed. Whether to accept the plea bargain was ultimately up to
Petitioner.

4 Order, Exh. 35 at 2-4 (ECF No. 22-21 at 4-6).

5 Mascarenas then asserted this claim on his appeal from the denial of his state
6 habeas petition. See Opening Brief, Exh. 43 (ECF No. 27-4). The Nevada Supreme
7 Court affirmed, ruling as follows:

8 Appellant argues that counsel was ineffective for failing to allow
9 appellant's parents to be present during discussions as to whether
appellant should accept the State's guilty plea offer, an offer which
10 appellant rejected. Appellant has failed to demonstrate deficiency or
prejudice. Appellant does not cite to any authority supporting his
11 proposition that an attorney representing a juvenile offender who has been
certified as an adult must advise or consult with his client's parents.
12 *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Further, the
district court's findings that counsel communicated the plea bargain to
13 appellant, that this is not a case where conviction was certain, and that
appellant was adamant in refusing the guilty plea because he felt he had
14 done nothing wrong are all supported by substantial evidence in the
record presented to this court. And although both parents testified at
15 appellant's evidentiary hearing, appellant failed to present any evidence
that either parent would have counseled him to accept the guilty plea offer.
16 Accordingly, appellant failed to demonstrate a reasonable probability of a
different outcome had counsel included appellant's parents in his guilty
17 plea discussions with appellant. We therefore conclude that the district
court did not err in denying this claim....

18 Order of Affirmance, Exh. 38 at 2-3 (ECF No. 22-24 at 6-7).

19 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court
20 propounded a two prong test for analysis of claims of ineffective assistance of counsel:
21 the petitioner must demonstrate (1) that the defense attorney's representation "fell
22 below an objective standard of reasonableness," and (2) that the attorney's deficient
23 performance prejudiced the defendant such that "there is a reasonable probability that,
24 but for counsel's unprofessional errors, the result of the proceeding would have been
25 different." *Strickland*, 466 U.S. at 688, 694. A court considering a claim of ineffective
26 assistance of counsel must apply a "strong presumption" that counsel's representation
27 was within the "wide range" of reasonable professional assistance. *Id.* at 689. The
28 petitioner's burden is to show "that counsel made errors so serious that counsel was not

1 functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at
 2 687. And, to establish prejudice under *Strickland*, it is not enough for the habeas
 3 petitioner “to show that the errors had some conceivable effect on the outcome of the
 4 proceeding.” *Id.* at 693. Rather, the errors must be “so serious as to deprive the
 5 defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

6 Where a state court has adjudicated a claim of ineffective assistance of counsel,
 7 under *Strickland*, establishing that the decision was unreasonable under AEDPA is
 8 especially difficult. See *Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme
 9 Court instructed:

10 The standards created by *Strickland* and § 2254(d) are both highly
 11 deferential, [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320,
 12 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two
 13 apply in tandem, review is “doubly” so, [*Knowles v. Mirzayance*, 556 U.S.
 14 111, 123 (2009)]. The *Strickland* standard is a general one, so the range
 15 of reasonable applications is substantial. 556 U.S., at 123, 129 S.Ct. at
 1420. Federal habeas courts must guard against the danger of equating
 unreasonableness under *Strickland* with unreasonableness under §
 2254(d). When § 2254(d) applies, the question is not whether counsel’s
 actions were reasonable. The question is whether there is any reasonable
 argument that counsel satisfied *Strickland*’s deferential standard.

16 *Harrington*, 562 U.S. at 105; see also *Cheney v. Washington*, 614 F.3d 987, 994-95 (9th
 17 Cir. 2010) (acknowledging double deference required for state court adjudications of
 18 *Strickland* claims).

19 The Nevada Supreme Court reasonably affirmed the denial of Mascarenas’ claim
 20 of ineffective assistance of counsel. The evidence presented at the evidentiary hearing
 21 showed plainly that Mascarenas’ trial counsel informed him of the plea offer, and
 22 advised him regarding the possible sentence he faced if he pled guilty under the plea
 23 offer and the possible sentence he faced if he went to trial. See Testimony of Scott
 24 Edwards, Transcript of Evidentiary Hearing, Exh. 34 at 12-19, 30 (ECF No. 22-20 at 14-
 25 21, 32); Testimony of Raymond Mascarenas, *id.* at 37-40 (ECF No. 22-20 at 39-42).
 26 And, the evidence showed that, despite the risk, Mascarenas insisted on rejecting the
 27 plea offer and going to trial. See Testimony of Scott Edwards, *id.* at 14 (ECF No. 22-20
 28 at 16); Testimony of Raymond Mascarenas, *id.* at 37, 39 (ECF No. 22-20 at 39, 41). The

1 Court knows of no authority, and Mascarenas has cited none, imposing a requirement
2 on counsel to involve his 18-year-old client's parents in the consideration of a plea offer;
3 counsel's failure to do so was not objectively unreasonable.

4 Moreover, Mascarenas was free to consult with his parents regarding the plea
5 offer, and did in fact do so. See Testimony of Raymond Mascarenas, *id.* at 37, 40 (ECF
6 No. 22-20 at 39, 42).

7 The Nevada Supreme Court's ruling on this claim was not contrary to, or an
8 unreasonable application of, clearly established federal law, as determined by the
9 Supreme Court, and was not based on an unreasonable determination of the facts in
10 light of the evidence presented. The Court will deny relief with respect to Ground 6.

11 **G. Certificate of Appealability**

12 The standard for issuance of a certificate of appealability is governed by 28
13 U.S.C. § 2253(c). The Supreme Court has interpreted section 2253(c) as follows:

14 Where a district court has rejected the constitutional claims on the merits,
15 the showing required to satisfy § 2253(c) is straightforward: The petitioner
16 must demonstrate that reasonable jurists would find the district court's
assessment of the constitutional claims debatable or wrong.

17 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074,
18 1077-79 (9th Cir. 2000).

19 Applying this standard, the Court finds that a certificate of appealability is not
20 warranted with regard to any of Mascarenas' claims.

21 It is therefore ordered that the petition for writ of habeas corpus (ECF No. 8) is
22 denied. Petitioner is denied a certificate of appealability.

23 It is further ordered that the Clerk of the Court is to enter judgment accordingly.

24 DATED THIS 14th day of September 2016.

25
26 

27 MIRANDA M. DU
28 UNITED STATES DISTRICT JUDGE